RECORD
AND
BRIEFS

No. 16-1276

In the Supreme Court of the United States

DIGITAL REALTY TRUST, INC., PETITIONER

v.

PAUL SOMERS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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Remarkably, in the very first paragraph of his brief in opposition, respondent all but concedes that certiorari should be granted: he acknowledges that the courts of appeals are "divided" on the question presented, and he further acknowledges that the question is "important and recurring." Br. in Opp. 1. Respondent proceeds to devote much of his brief to arguing that the decision below is correct. See *id.* at 12-20. Of course, respondent may reprise those arguments at the merits stage if the Court grants certiorari. For present purposes, however, it suffices to observe that the five of the nine appellate judges who have

considered the question presented disagree with respondent's interpretation of the Dodd-Frank Act's anti-retaliation provision. The sharply contrasting views of those judges underscore the need for this Court's review.

To the extent that respondent halfheartedly argues that further review is nevertheless unwarranted, his arguments plainly lack merit. Respondent urges the Court to await further percolation on the question presented. But respondent fails to identify any particular benefit from doing so: the relevant arguments are fully developed in the existing lower-court opinions, and respondent offers no plausible reason to believe that the conflict will eventually disappear. To the contrary, denying certiorari in this case would merely prolong the confusion in the lower courts, while continuing to expose employers to the significant burdens associated with defending retaliation claims under the Dodd-Frank Act.

Respondent's vehicle arguments fare no better. The interlocutory posture of this case presents no obstacle to the Court's review; indeed, with respondent's consent, further proceedings in the district court have been stayed pending the disposition of this petition. And while respondent points to an exhaustion argument that petitioner made below, that too presents no bar, because the district court deemed the argument forfeited and petitioner is no longer advancing it. As the broad amicus support and commentary confirm, the case for certiorari here is overwhelming. The petition should be granted.

1. Respondent primarily argues (Br. in Opp. 3-8) that, notwithstanding the conceded circuit conflict on the question presented, further percolation is warranted. Respondent does not dispute, however, that the arguments on both sides of the question presented are well developed in five opinions from three court of appeals panels and in

more than two dozen opinions from district courts nationwide. Further percolation thus would not aid the Court's consideration and resolution of the question presented. And respondent's speculation that the conflict will disappear, or that Congress will amend the Dodd-Frank Act's anti-retaliation provision, or that the Securities and Exchange Commission will amend its rule, is just that: speculation. There is no valid justification for postponing further review on this concededly important and recurring question.

a. While respondent concedes that "the existing conflict is admittedly clear," he contends that it is "entirely possible" that the conflict will disappear because "the Fifth Circuit will eventually reconsider its position" and "additional circuits [will] adopt the majority position." Br. in Opp. 4-5 & n.4.

That is highly unlikely. As a preliminary matter, respondent skates past the substantial and continuing divergence in the lower courts, which belies any claim of an emerging consensus. Respondent completely ignores the vigorous dissents—by Judge Jacobs on the Second Circuit and Judge Owens on the Ninth Circuit—from the two court of appeals decisions to have adopted his interpretation. Taking the dissenters' views into account, five of the nine appellate judges who have considered the question presented have adopted petitioner's interpretation rather than respondent's. And notwithstanding the divided decisions of the Second and Ninth Circuits, district courts in other circuits have continued to adopt petitioner's interpretation as well: since the beginning of 2015, five of the seven district court decisions from other circuits have adopted petitioner's interpretation, and only two have adopted respondent's. See Pet. 12, 15. In light of that continuing disagreement, it is highly doubtful that other

circuits will simply fall into line with the Second and Ninth Circuits, rather than following the Fifth.

Nor is there any reason to believe that the Fifth Circuit will reverse course in light of the conflicting decisions of the Second and Ninth Circuits. For starters, the Fifth Circuit has already rejected the very arguments that animated the majority opinions in those cases. See *Asadi* v. *G.E. Energy (USA), L.L.C.*, 720 F.3d 620, 626-630 (5th Cir. 2013). Conversely, the dissenting judges in those cases expressly adopted the Fifth Circuit's reasoning. See Pet. App. 11a (Owens, J., dissenting); *Berman* v. *Neo@Ogilvy LLC*, 801 F.3d 145, 155-157 (2d Cir. 2015) (Jacobs, J., dissenting).

To be sure, as respondent correctly notes (Br. in Opp. 4), the SEC did not "direct[ly] participat[e]" as an amicus curiae before the Fifth Circuit. But that is of no moment, because the Fifth Circuit had the benefit of the SEC's views in the form of the rule interpreting Section 78u-6—which was accompanied by a detailed explanation of the SEC's rationale for adopting it. See 76 Fed. Reg. 34,302-34,304 (2011). The Fifth Circuit reviewed the SEC's interpretation and ultimately rejected it on the ground that it was inconsistent with the unambiguous text of the statute (and thus not entitled to deference). See *Asadi*, 720 F.3d at 629-630. For that reason, it stretches credulity to suggest that the Fifth Circuit would have reached a different result if only it had received an amicus brief from the SEC defending its rule.

Beyond his argument that the Fifth Circuit might one day reverse itself, respondent wisely does not argue that a two-to-one circuit conflict is too shallow to warrant further review. Especially in recent years, the Court has routinely granted review to resolve two-to-one or even one-to-one circuit conflicts. See, *e.g.*, *Expressions Hair*

Design v. *Schneiderman*, 137 S. Ct. 1144 (2017) (2-1 conflict); *Taylor* v. *United States*, 136 S. Ct. 2074 (2016) (2-1); *Ocasio* v. *United States*, 136 S. Ct. 1423 (2016) (1-1); *Nichols* v. *United States*, 136 S. Ct. 1113 (2016) (1-1); *Luis* v. *United States*, 136 S. Ct. 1083 (2016) (1-1). Given the continuing divergence in the lower courts, postponing further review would serve no purpose other than allowing the conflict to fester and deepen.

b. Respondent next suggests (Br. in Opp. 5-6) that Congress might amend the Dodd-Frank Act, or the SEC might amend its rule, in a way that resolves the question presented. That is pure speculation. While Congress is currently considering amendments to the Dodd-Frank Act, the amendments proposed to date would have no bearing on the question presented. See Financial Choice Act, H.R. 10, 115th Cong. (2017). The only proposed amendment related to the anti-retaliation provision would deny awards to whistleblowers who are complicit in the wrongdoing they report. See *id.* § 828. Nor is there any indication that the SEC intends to amend its rule; even respondent recognizes that such an amendment is "exceedingly unlikely * * * for any number of obvious reasons." Br. in Opp. 6.

c. Respondent is left to argue (Br. in Opp. 6-8) that awaiting further percolation would pose no significant cost to employers such as petitioner. That is apparently because, in respondent's view, "petitioner's alleged conduct violates federal law; the only question is whether relief is available under two statutes, rather than one." *Id.* at 4.

Respondent's concessions elsewhere in his brief expose the fallacy of that argument. In the very first paragraph, respondent acknowledges that the question presented is "admittedly important." Br. in Opp. 1; see *id.* at 9 (stating that the case presents a "pure and important

question of law"). The question presented by this case is not whether employees such as respondent have two retaliation claims (under both the Sarbanes-Oxley Act and the Dodd-Frank Act) or only one (under the Sarbanes-Oxley Act). Indeed, respondent *cannot* bring a retaliation claim under the Sarbanes-Oxley Act, both because any such claim would be time-barred and because respondent failed to invoke that Act's administrative-review procedure. See Pet. 18-19.

If allowed to stand, the decision below will create incentives for other employees who do not report wrongdoing to the SEC to do precisely what respondent did here: namely, to circumvent the administrative-review procedure, and avoid the limitations period, established by the Sarbanes-Oxley Act. As petitioner's amici have explained, allowing employees to engage in such circumvention imposes heavy burdens on employers and threatens to render the Sarbanes-Oxley regime effectively obsolete. See Chamber of Commerce Br. 10-12 (citing the proliferation of whistleblower lawsuits under the Dodd-Frank Act and the loss of the Sarbanes-Oxley regime's benefits for employers); DRI Br. 9-13 (explaining the substantial risk of liability under the Dodd-Frank Act stemming from the broad range of reporting protected by the Sarbanes-Oxley Act); Lime Energy Br. 3-4 (noting the "unnecessary cost and administrative complexity" caused by the circuit conflict). By any measure, those are serious costs to further percolation, and they weigh heavily in favor of immediate review.

2. Respondent advances two passing vehicle arguments (Br. in Opp. 8-12), but both are patently flawed. As respondent concedes, the petition "present[s] a pure and important question of law," *id.* at 9, and there is no obstacle to reviewing and resolving that question here.

a. Respondent first contends (Br. in Opp. 8-9) that this Court should deny review because the case arises in an interlocutory posture. But the Court routinely grants certiorari where, as here, a petition presents a clean and dispositive legal question before final judgment. See, *e.g.*, *Midland Funding, LLC* v. *Johnson*, 137 S. Ct. 1407 (2017); *Bank of America Corp.* v. *City of Miami*, 137 S. Ct. 1296 (2017); *SCA Hygiene Products Aktiebolag* v. *First Quality Baby Products, LLC*, 137 S. Ct. 954 (2017).

As in those cases, the interlocutory posture of this case presents no barrier to review. Respondent has conceded that the question presented is a "pure" one of law, and respondent does not dispute that a ruling in petitioner's favor on that question would dispose of his claim under the Dodd-Frank Act. With respondent's consent, the district court stayed further proceedings pending the disposition of this petition. See D. Ct. Dkt. 210 (Apr. 11, 2017). And while respondent suggests that "further proceedings could develop a fuller record," Br. in Opp. 9, he does not specify how additional factual development would be relevant to resolution of the "pure" question of law that this case concededly presents.

b. Finally, respondent contends (Br. in Opp. 9-12) that this Court would have to consider and resolve the additional question whether respondent's claim under the Dodd-Frank Act fails because he was required to (and did not) exhaust his remedies under the Sarbanes-Oxley Act. But the district court deemed the exhaustion argument forfeited, see Pet. App. 43a-44a; the court of appeals did not address it, see *id.* at 1a-11a; and petitioner did not raise it in the petition. Nor does petitioner intend to advance that argument in further proceedings before this Court; upon further consideration, petitioner agrees that respondent's failure to exhaust his remedies under the Sarbanes-Oxley Act does not present a jurisdictional bar

to his claim under the Dodd-Frank Act. As this case comes to the Court, therefore, both parties and both lower courts agree that the case raises no jurisdictional issue. The case is therefore a clean vehicle for addressing the question presented—a concededly important and recurring question on which the courts of appeals are indisputably divided.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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